

November 16, 2006

Civil Division-Kent County (739-7641)

Mr. Daniel J. Kramer  
8041 Scotts Store Road  
Greenwood, DE 19950

Re: **Freedom of Information Act Complaint  
Against Sussex County Council**

Dear Mr. Kramer:

On September 7, 2006, our Office received your complaint under the Freedom of Information Act, 29 Del. C. Chapter 100 ("FOIA"), alleging that the Sussex County Council ("the Council") violated the open meeting requirements of FOIA by meeting in executive session on August 22, 2006 for a purpose not authorized by law. You attached to your complaint the agenda for that meeting which listed for executive session "Personnel, Pending Litigation, and Land Acquisition." You allege that during the executive session the Council discussed which of two land use consultants to hire.

By letter dated September 8, 2006, we asked the Council to respond to your complaint by September 18, 2006. We granted the Council's request for a brief extension of time in order to allow the Clerk of the Council time to prepare the minutes of the executive and regular session

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of the Council held on August 22, 2006. We received the Council's response on September 26, 2006. On October 26, 2006, we asked the Council for the minutes of the Council's October 3, 2006 meeting, which we received on October 31, 2006.

The minutes of the Council's August 22, 2006 meeting state that at a meeting the week before (August 15, 2006), the Council invited "Johnson, Mirmiran & Thompson and Urban Research & Development Corporation, the two top ranking consulting firms who submitted Land Use Consultant Contract proposals, to give presentations at the August 22<sup>nd</sup> Council meeting on their contract proposals to assist the County with the review and update of the 2007 Comprehensive Land Use Plan." According to the Council, during the August 22, 2006 meeting the public heard thirty-minute presentations by the two consulting firms "to explain to Council and the public why their company should be hired. Further, after each of the prospective consultant companies completed their presentations Council members were given ample time to question the presenters."

The minutes of the public session of the August 22, 2006 reflect that after the two consulting firms made their presentations, the Council went into executive session for fifteen minutes. The minutes of the executive session (which the Council provided to us for our *in camera* review) show that the Council "discussed the presentations made in public session" by the two consulting firms and "discussed the qualifications, abilities and competencies of the two firms." <sup>1</sup>

After the Council returned to public session, the minutes show that the Council voted to

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<sup>1</sup> "When we refer to minutes of an executive session provided to us *in camera*, we are careful not to disclose any substantive information that FOIA authorizes for private discussion. For matters not authorized for executive session, however, any portions of the minutes reflecting discussion of those matters is not protected under FOIA, and we feel free to refer to those portions of the minutes in greater detail." *Att'y Gen. Op.* 05-IB24 (Aug. 18, 2005), Note 4.

authorize the County Administrator to enter into contract negotiations with Urban Research & Development Corporation for the 2007 Sussex County Comprehensive Land Use Update.

The Council contends that under FOIA "it had the right to enter into a contract with a land use consultant without holding any form of public session and Council's decision to hold a public session should not now be used as a basis for a complaint that after having heard the presentations in public they were then barred from discussing them in private, subject to the County complying with appropriate procedures for awarding such contracts, such as any applicable public bidding requirements."

At the executive session on August 22, the Council also discussed – in addition to the land use consultants – the hiring of two persons for the positions of Director of Accounting and Budget Manager.

By letter dated October 2, 2006, you alleged that the Council could not have discussed valid personnel matters in executive session on August 22, 2006 because the two persons "were interviewed by a committee and hired by Robert L. Stickles, County Administrator and/or David Baker, Finance Director, not by the County Council."

By letter dated October 6, 2006, the Council responded that FOIA's authorization to discuss personnel matters in executive session "is broad enough to allow Council to receive advice that its administrative staff had interviewed 7 applicants for the positions of Director of Accounting and Budget Manager and was prepared to offer those positions to the two individuals specifically identified in the executive session minutes. The fact that Council was not required to approve the awarding of those positions in open session should not preclude the Council from being advised in executive session of the status of the selection process for the positions of Director of Accounting

and Budget Manager."

### **RELEVANT STATUTES**

FOIA requires that "[a]ll public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof." 29 *Del. C.* §10004(e)(2).

FOIA authorizes a public body to meet in executive session to discuss "an individual citizen's qualifications to hold a job . . . ." *Id.* §10004(b)(1). FOIA also authorizes a public body to meet in executive session to discuss "[p]ersonnel matters in which the names, competency and abilities of individual employees or students are discussed, . . . ." *Id.* §10004(b)(9).

### **LEGAL ANALYSIS**

#### **A. Job Qualifications**

This exemption for executive session is often confused with the personnel exemption. The personnel exemption allows discussion in private of "the names, competency and abilities of individual employees . . . ." 29 *Del. C.* §10004(b)(9). The job applicant exemption only applies to persons not yet hired.

In *Att'y Gen. Op.* 05-IB14 (June 8, 2005), our Office determined that FOIA's job applicant exemption for executive session did not apply when the city council met privately to decide which consultant to hire as a full-time lobbyist.

A vendor or independent contractor does not share

the same privacy concerns as an individual public employee or prospective public employee. When a business bids for work from a public body, it is not applying for a 'job' in any common sense meaning of that term. A vendor or contractor has little if any expectation of privacy when marketing its goods or services for sale to a public body. . . . The experience, reputation, and qualifications of vendors and contractors are subject to constant comparison in the marketplace through advertising and the public bidding process. To construe FOIA to deem them 'job applicants' would cloak the decision-making process for the expenditure of most tax monies from public scrutiny, a result clearly inconsistent with the purposes of FOIA.

The two land use consulting firms which the Council discussed at the meeting on August 22, 2006 were not applicants for public employment but rather were contractors marketing their credentials in order to do government business. FOIA did not authorize the Council to meet in executive session to discuss the comparative qualifications of those two consultant firms.<sup>2</sup>

We determine that the Council violated the open meeting requirements of FOIA when it met in private on August 22, 2006 to discuss which of those two consulting firms to hire.

B. Personnel Matters

Our Office has previously determined that discussion of consultants and contractors does not fall within FOIA's personnel exemption for executive session. The personnel exemption "is limited to discussion of 'the names, competency and abilities of individual employees . . .'" *Att'y Gen. Op.*

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<sup>2</sup> "We do not mean to suggest that FOIA does not offer some protection for the competitive position of a public body engaged in ongoing contract negotiations." *Att'y Gen. Op.* 05-IB24 (Aug. 18, 2005). "In *Att'y Gen. Op.* 05-IB13 (May 9, 2005), we acknowledged that FOIA may exempt from public disclosure draft contracts that were still being negotiated. 'Premature disclosure of draft contracts under negotiation also could compromise the public body's (and the public's) competitive position in those negotiations.'" *Att'y Gen. Op.* 05-IB24 (quoting *Att'y Gen. Op.* 05-IB13). The Council met in executive session on August 22, 2006 to discuss which of two consulting firms to authorize the County Administrator to begin contract negotiations, not to discuss any ongoing contract negotiations.

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02-IB17 (Aug. 6, 2002) (quoting 29 *Del. C.* §10004(b)(9)).

In *Att'y Gen. Op.* 02-IB17, our Office determined that FOIA did not authorize the school board to meet in executive session with three private consulting firms to discuss their qualifications to conduct a nationwide search for a new superintendent because a "search consultant is not an 'employee' of the School Board." *See also Att'y Gen. Op.* 05-IB02 (Jan. 12, 2005) (personnel exemption for executive session did not apply to discussion of legal fees for outside counsel because they "are not employees of the City").

We determine that FOIA's personnel exemption did not authorize the Council to meet in executive session to discuss which of two land use consultants to hire. That exemption would only cover discussion of the names, competency, and abilities of County employees, not of an independent contractor.

At the executive session on August 22, 2006 the Council discussed – in addition to the two land use consultants – the positions of Director of Accounting and Budget Manager.

You contend that County Administrator or the Finance Director had the authority to hire for those two positions and did not need the Council's approval, therefore FOIA did not authorize the Council to discuss the hiring process in private. The Council responds that, even if it "was not required to approve the awarding of those positions in open session should not preclude Council from being advised in executive session of the status of the selection process for the positions of Director of Accounting and Budget Manager."

We have reviewed *in camera* the minutes of the Council's executive session on May 24, 2005. They show that the Finance Director informed the Council that seven persons were interviewed for the positions of Director of Accounting and Budget Manager and the Finance

Director named the two individuals to whom he was offering the positions.

According to the County, the person hired for the position of Director of Accounting was already on staff and next-in-line for that position when it became vacant. The person hired for the position of Budget Manager was a new hire. Although the County relies on FOIA's personnel exemption for executive session, we believe the more appropriate exemption is the one for job applicants. We do not believe that exemption for executive session turns of whether the Council or the County Administrator had the authority to hire for those two positions. The purpose of the exemption is to protect the individual privacy of the prospective public employee. *See Att'y Gen. Op. 05-IB12* (May 9, 2005) ("[T]he two applicants had a reasonable expectation of privacy . . . When a job offer is extended and accepted, the name of the job applicant necessarily will become public . . .").

We determine that FOIA authorized the Council to meet in private to hear about the interviewing process and the names of the two successful applicants for the positions of Director of Accounting and Budget Manager.

### C. Remediation

The Council contends that even if it "should not have discussed the consultant selection in executive session, its doing so did not violate the rights of the public who received notice and had the opportunity to be present during the public presentations by the two prospective consultants and to hear the questioning of those applicants by Council members. Further, as the October 3, 2006 agenda will indicate, the Council will act publicly when it further considers and possible awards the

contract to one of the two applicants."

The Council provided us with a copy of the agenda for its October 3, 2006 meeting, which listed "Land Use Plan Consultant Contract. The minutes of that meeting show the Council voted to approve "an Agreement with Urban Research & Development Corporation (URDC) for a fee not to exceed \$225,000 for the Sussex County Comprehensive Land Use Plan Update, including zoning and subdivision ordinance revisions, subject to final approval by the Assistant County Attorney, County Administrator, and County Finance Director."

We do not believe that any remediation is necessary for the Council's having met in executive session on August 22, 2006 to discuss which of two land use consultants to hire – a purpose not authorized by FOIA for private discussion. The public was substantially involved in the selection process, first hearing the 30-minute presentations by the two consultants and questioning in public by the Council at the meeting on August 22, 2006. The Council awarded the contract in a meeting noticed and open to the public on October 3, 2006. Because of the substantial public involvement in the selection process, we do not believe that remediation would serve any purpose at this time.



### **CONCLUSION**

For the foregoing reasons, we determine that the Council did not violate FOIA when it met in executive session on August 22, 2006 to hear from the Finance Director about the interview process and the names of the two successful applicants for the positions of Director of Accounting and Budget Manager.

We determine that the Council violated FOIA when it met in private on August 22, 2006 to discuss the two applicants for a land use consulting contract. Neither FOIA's personnel nor job applicant exemption for executive session applied to the hiring of an independent contractor.

We do not believe that any remediation is necessary for this violation of the open meeting law because the public was substantially involved in the process by which the Council awarded the contract to one of the two consultants.

The Council is cautioned to strictly comply with the open meeting requirements of FOIA in the future.

Very truly yours,

W. Michael Tupman  
Deputy Attorney General

APPROVED

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Lawrence W. Lewis, Esquire  
State Solicitor

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cc: The Honorable Carl C. Danberg  
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